

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KEVIN LEE MCCULLOM,

Plaintiff,

v.

GREGORY J. AHERNS, et al.,

Defendants.

Case No. 15-05718 HRL (PR)

**ORDER OF SERVICE;
TERMINATING DEFENDANT
GREGORY AHERNS FROM THIS
ACTION; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTION TO
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against Santa Rita County Jail officials. Plaintiff then filed an amended complaint. (Docket No. 15.) Federal Rule of Civil Procedure 15(a) is to be applied liberally in favor of amendments and, in general, leave shall be freely given when justice so requires. See Janicki Logging Co. v. Mateer, 42 F.3d 561, 566 (9th Cir. 1994). Because the matter has not yet been served and no undue prejudice to the opposing party will result, the amendment is GRANTED. The amended complaint is the operative complaint in this action. Plaintiff's motion for leave to proceed in forma pauperis will be addressed in a separate order.

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DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Plaintiff's Claims

Plaintiff claims that Defendants P. Whittaker and T. S. Jacobs, employees in the Santa Rita County Jail mailroom, illegally confiscated his mail to the Supreme Court of California, containing a complaint against corrupt attorneys who were involved with his prosecution out of Oakland Superior Court. (Am. Comp. at 3.) Plaintiff also claims that these two mailroom employees returned mail in an action before this Court (CV 15-03363) as undeliverable "to manipulate the lawsuit" he had against Oakland Police Officers involved in his criminal case. (Id.) Liberally construed, Plaintiff states a violation of his First Amendment right to send and receive mail, see Witherow v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989)), as well as a denial of his right to access to the courts without active interference, see Silva v. Di Vittorio, 658 F.3d 1090, 1102, 1103-04 (9th Cir. 2011).

Plaintiff also names Sheriff Gregory J. Aherns as a defendant in this action, (Am. Compl. at 2), but makes no specific allegations against him. In fact, he does not mention

1 Sheriff Aherns at all in his "Statement of Claim." (Id. at 3.) Accordingly, this Defendant
2 is dismissed from this action.

4 CONCLUSION

5 For the reasons state above, the Court orders as follows:

6 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
7 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
8 of the complaint, all attachments thereto, and a copy of this order upon **Defendants P.**
9 **Whittaker and T. S. Jacobs at Santa Rita County Jail** (5325 Broder Blvd., Dublin, Ca
10 94568). The Clerk shall also mail a copy of this Order to Plaintiff.

11 Defendant Gregory J. Aherns is DISMISSED from this action as Plaintiff makes no
12 claims against him. The Clerk shall terminate this Defendant from this action.

13 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
14 Procedure requires them to cooperate in saving unnecessary costs of service of the
15 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this
16 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail
17 to do so, they will be required to bear the cost of such service unless good cause shown for
18 their failure to sign and return the waiver form. If service is waived, this action will
19 proceed as if Defendants had been served on the date that the waiver is filed, except that
20 pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer
21 before **sixty (60) days** from the day on which the request for waiver was sent. (This
22 allows a longer time to respond than would be required if formal service of summons is
23 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver
24 form that more completely describes the duties of the parties with regard to waiver of
25 service of the summons. If service is waived after the date provided in the Notice but
26 before Defendants have been personally served, the Answer shall be due sixty (60) days
27 from the date on which the request for waiver was sent or twenty (20) days from the date
28

1 the waiver form is filed, whichever is later.

2 3. No later than **ninety (90) days** from the date of this order, Defendants shall
3 file a motion for summary judgment or other dispositive motion with respect to the claims
4 in the complaint found to be cognizable above.

5 a. Any motion for summary judgment shall be supported by adequate
6 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
7 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
8 qualified immunity found, if material facts are in dispute. If any Defendant is of the
9 opinion that this case cannot be resolved by summary judgment, he shall so inform the
10 Court prior to the date the summary judgment motion is due.

11 b. **In the event Defendants file a motion for summary judgment, the**
12 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
13 **warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
14 **Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

15 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
16 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
17 motion is filed.

18 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
19 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment
20 must come forward with evidence showing triable issues of material fact on every essential
21 element of his claim). Plaintiff is cautioned that failure to file an opposition to
22 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
23 the granting of the motion, and granting of judgment against Plaintiff without a trial. See
24 Ghazali v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18
25 F.3d 651, 653 (9th Cir. 1994).

26 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
27 Plaintiff's opposition is filed.

6. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.

7. All communications by the Plaintiff with the Court must be served on Defendants, or Defendants' counsel once counsel has been designated, by mailing a true copy of the document to Defendants or Defendants' counsel.

8. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is required before the parties may conduct discovery.

9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the court informed of any change of address and must comply with the court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10. Extensions of time must be filed no later than the deadline sought to be extended and must be accompanied by a showing of good cause.

IT IS SO ORDERED.

Dated:

5/20/16

HOWARD R. LLOYD
United States Magistrate Judge

Order of Service
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